IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10847 OF 2004

Kamlesh N. Shah & Anr.	...	Petitioners
Vs.		
M/s. Click Investments & Trading Company Pvt. Ltd.	...	Respondents

Mr. M.U. Pandey with Mr. M.S. Pandey for the petitioners.

Ms. Ranjan Parikh for the respondents.

CORAM: SMT. RANJANA DESAI, J.

DATED: 8TH FEBRUARY, 2005.

P.C.:-

1. The petitioners are the original defendants. The plaintiffs filed a suit against the defendants on the ground of arrears of rent and illegal sub-letting. The case of the plaintiffs was that defendant 1 illegally sub-let the suit premises to defendant 2. The trial court passed the decree in favour of the plaintiffs on the ground of illegal sub-letting. The lower appellate court confirmed it and, hence, this petition.

2. I have heard, at some length, Mr. Pandey, the learned counsel for the petitioners-defendants. He contended that the fact that defendant 1 had not signed the written statement has weighed with the lower appellate court while passing its judgment. Relying on the judgment of this court in **Dahyabhai Girdhardas v.**

Bobaji Dahyaji Kotwal and others, AIR 1953 Bom. 28, the learned counsel submitted that non signing of written statement by defendant 1 is merely an irregularity. The written statement can be allowed to be amended at a later stage by allowing defendant 1 to sign irrespective of the bar of limitation, inasmuch as the said defect is merely formal. The learned counsel further submitted that the judgments of both the courts below are against the weight of evidence on record. He contended that particularly the judgment of the lower appellate court suffers from patent illegality inasmcuh as the lower appellate court has treated the case put to defendant 1 by the plaintiffs in the course of cross-examination, as evidence. He submitted that various documents were merely put to the defendants in the cross-examination. The learned judge could not have relied on those documents. In this connection, the learned counsel relied on the judgment of this court in **Om Prakash Berlia and another v. Unit Trust of India and others, AIR 1983 Bom. 1;** judgment of the Madhya Pradesh High Court in **Sakariya v. State of Madhya Pradesh, 1991 Cri.L.J. 1925,** judgment of the Gujarat High Court in **Koli Trikam Jivraj and another v. The State of Gujarat, AIR 1969 Guj. 69 (V 56 C 14)**.

3. I am unable to agree with the learned counsel. So far as the non-signing of written statement by defendant 1 is concerned, the lower appellate court has merely referred to this fact and clarified that instead of giving much importance to technical legalities, it was

treating the said written statement as written statement. There is nothing to indicate that non-signing of vakalatnama by defendant 1 has weighed with the court and, hence, it has given the verdict against the defendants. This submission of the learned counsel must be rejected.

4. So far as the merits of the case are concerned, in my opinion, the concurrent finding of fact returned by the courts below is unassailable. The courts below have considered the evidence on record in its proper perceptive and no fault could be found with their marshalling of evidence. It is pertinent to note that defendants 1 and 2 have filed S.C. Suit No.520 of 1994 in the Bombay City Civil Court at Bombay, against the plaintiffs for permanent injunction. In that suit, defendants 1 and 2 have mentioned in the plaint that plaintiff 1 therein has filed the suit in his individual capacity and plaintiff 2 therein is a partnership firm. It is further stated that plaintiff 2 are in possession of the office premises viz. Office No.2, Second floor, Zhaveri House, Madows Street, Fort, Bombay, which are the suit premises herein and plaintiff 2 are carrying on the business of share broker, etc. It is also mentioned that for some years, plaintiffs 1 and 2 carried on the business and then finally by mutual understanding, for last about 3 years, plaintiffs 2 alone is carrying on the business in the suit premises. These assertions made in the said suit by the defendants who are the plaintiffs

therein indicate sub-letting by defendant 1 to defendant 2. Further, the courts below have found that the story put up by the defendants that they are doing business from the suit premises in the name and style of J.G. Shah & Co. with Mr. J.G. Shah as a joint venture, is not acceptable. Upon consideration of evidence, the courts below have found that there is no evidence to suggest that any business was carried on by the defendants with Mr. J.G. Shah in the name and style of J.G. Shah & Co. Several documents, the detailed reference of which need not be made in this order, have been referred to by the trial court in its judgment. They show that it is defendant 2 who is carrying on the business in the suit premises. The submission of the learned counsel for the petitioners that only the case put to defendant 1 by the plaintiffs is relied upon by the lower appellate court, as evidence, is not true. In fact, the lower appellate court has stated in its judgment that after perusal of the evidence of PW-1 it is of the opinion that the case of sub-letting is made out. The learned counsel is not right when he contends that the entire judgment rests only on the case put to defendant 1. The judgments cited by the learned counsel are pertaining to the criminal law where proof beyond reasonable doubt is a must. Even assuming that the judgments cited by the learned counsel are applicable, this is not a case where the lower appellate court has merely relied on the case put by the plaintiffs to defendant 1. Both the courts have correctly appreciated

the evidence. There is no perversity in the impugned judgments. In view of the above, there is no substance in the petition. Petition is dismissed.

5. At this stage, the learned counsel for the petitioner states that the execution of the decree may be stayed. The learned counsel for the respondents objects. In the facts and circumstances of the case, execution of the decree is stayed for a period of four weeks on the petitioners and all their partners filing the usual undertaking in this court, within a period of two weeks from today.

(SMT. RANJANA DESAI, J.)